No. 14-19-00154-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

No. 1527611
In the 208th District Court
of Harris County, Texas

The State of Texas
State
v.
John Wesley Baldwin
Appellee

State's Appellate Brief

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Oral Argument Requested

Statement Regarding Oral Argument

Pursuant to Rule 39.7 of the Texas Rules of Appellate Procedure, the State requests oral argument. Although this Court's review of the affidavit in support of the search warrant is constrained to the facts set out in the four corners of the affidavit, oral argument may assist the Court in analyzing the reasonable inferences that the magistrate could have made and to which the trial court should have deferred.

Identification of the Parties

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the State provides the following complete list of the names of all parties to the trial court's order and the names and addresses of all trial and appellate counsel:

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Presiding Judge at the Hearing:

The Honorable Denise Collins—Former presiding judge of the 208th District Court

Presiding Judge who Issued the Written Order:

The Honorable Greg Glass—Presiding judge of the 208th District Court

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Statement of the Case

The appellee was indicted for the offense of capital murder. (C.R. 10). The appellee filed a motion to suppress evidence obtained from his cellular telephone, his statements, and testimony about that evidence and those statements. (C.R. 66–73). Following a hearing on the appellee's motion, the Honorable Denise Collins, presiding judge of the 208th District Court, found that the facts set out in the affidavit were insufficient to establish probable cause that the appellee's phone would contain evidence of the capital murder. (II R.R. 17–18). Judge Collins orally granted the appellee's motion to suppress the evidence obtained from his phone. (II R.R. 18). The Honorable Greg Glass, the newly-elected presiding judge of the 208th District Court, later issued a written order granting the appellee's motion to suppress in its entirety. (C.R. 88–96). The State timely filed its notice of appeal from the trial court's order. (C.R. 97–99); Tex. Code Crim. Proc. art. 44.01.

Issues Presented

Issue 1: Did the trial court err in finding that the affidavit failed to establish probable cause to sustain the issuance of the search warrant for the appellee's cell phone?

Issue 2: Did the trial court err in granting the appellee's motion to suppress his statements and any testimony about those statements when

the court's findings and the record show that law enforcement lawfully obtained those statements?

Statement of Facts

On September 23, 2016, Deputy Casey Parker, an investigator assigned to the Homicide Division of the Harris County Sheriff's Office (HCSO), applied for a search warrant for a Samsung Galaxy5 cellular telephone. (State's Ex. 4). In her sworn affidavit, Deputy Parker set out these facts:

Deputy Parker investigated the robbery and murder of the complainant Adrianus Kasuma, which occurred at his home at about 8:40 PM on September 18, 2016. (State's Ex. 4). Sebastianus Kasuma, the complainant's brother, was present during the capital murder. (State's Ex. 4). Sebastianus heard a loud banging noise and, when he went to investigate the sound, an armed, masked black male confronted him. (State's Ex. 4). The masked gunman demanded money from him and then assaulted him with his fists and the gun. (State's Ex. 4).

While Sebastianus was fighting with the gunman, he heard a gunshot from the kitchen area of the residence. (State's Ex. 4). He turned and saw a second masked black male run from the back of the residence. (State's Ex. 4). The two suspects grabbed a box of receipts and money from the Kusumas' family business and fled through the front door. (State's Ex. 4). Sebastianus followed them and observed them get into a white, four-door sedan and flee the scene. (State's Ex. 4). Sebastianus

returned to the residence and found the complainant lying on the kitchen floor near the back door. (State's Ex. 4). The complainant had a gunshot wound to his chest and was unresponsive. (State's Ex. 4).

The complainant's neighborhood consists of only a single, circling boulevard with multiple small cul-de-sac streets that branch off of it. (State's Ex. 4). The neighborhood is only accessible to motor vehicles from a single entrance. (State's Ex. 4).

On Saturday, September 17, 2016—the day before the murder—another citizen observed a white, four-door Lexus vehicle, bearing Texas license plate number GTK-6426 and occupied by two black males, repeatedly circle the neighborhood and the complainant's residence. (State's Ex. 4). The citizen found the vehicle so suspicious that she photographed it and captured its license plate number. (State's Ex. 4).

At dusk on the day of the offense, a citizen who lived about two and a half blocks from the complainant's house observed a white Lexus GS300 vehicle driven by a large black male pass by his residence three times. (State's Ex. 4).[1] Shortly after this vehicle passed the citizen's residence the third time, the citizen heard the emergency vehicles' sirens. (State's Ex. 4). At about 8:45 PM, a citizen who lived near the entrance

[1] Deputy Parker used the word "duck," rather than "dusk," in her affidavit. (State's Ex. 4). The magistrate—like the trial judge—could have reasonably concluded that this was a misspelling. (II R.R. 14).

of the neighborhood observed a white, four-door sedan exit the neighborhood at a high rate of speed. (State's Ex. 4). Within minutes, the citizen observed emergency vehicles enter the neighborhood. (State's Ex. 4).

A video system at a residence only five houses north of the complainant's home confirmed that a white, four-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426, had been in the neighborhood the day before and the day of the capital murder. (State's Ex. 4).[2] On Saturday, September 17, 2016, the video system captured an image of the vehicle at 2:03 PM. (State's Ex. 4). On Sunday, September 18, 2016, the day of the murder, the video system captured images of the vehicle at 8:15 PM, 8:16 PM, and 8:23 PM. (State's Ex. 4). At 8:23 PM, the vehicle paused before leaving the view of the camera. (State's Ex. 4). The capital murder occurred within the next fifteen minutes. (State's Ex. 4).

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[2] Deputy Parker stated in her affidavit that the video system captured images of the vehicle "circling the neighborhood on Saturday, September 17, 2016 and Sunday, September, 18, 2016." (State's Ex. 4). In specifying the dates and times that the video system captured images of the vehicle, she mistakenly identified the dates as "Saturday, September 18, 2016," and "Sunday, September 19, 2016." (State's Ex. 4). In two other sentences in the affidavit, she correctly identified September 17, 2016, as a Saturday and September 18, 2016, as a Sunday. (State's Ex. 4). Thus, from the face of the affidavit, the magistrate could have properly concluded—as the trial court did—that the incorrect dates are merely typographical errors. (II R.R. 13–14); *see Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (holding that purely technical or clerical discrepancies in dates or times do not automatically vitiate the validity of search or arrest warrants).

On September 22, 2016, four days after the offense, patrol deputies stopped the vehicle bearing Texas license plate GTK-6426 for traffic violations. (State's Ex. 4). The deputies found the appellee, a black male, operating the vehicle. (State's Ex. 4). The appellee consented to a search of the vehicle, and a Samsung Galaxy5 phone was recovered. (State's Ex. 4). The appellee identified the telephone number for the device. (State's Ex. 4).

Deputy Parker also detailed her knowledge, based on her training and experience, about cellular "smart" phones. (State's Ex. 4). These phones may contain electronic data such as incoming and outgoing telephone calls and text messages, emails, video recordings, photographs, voicemail messages, and identifying information. (State's Ex. 4). Additionally, a search of a cellular "smart" phone will reveal its telephone number and the service provider for the device, which enables law enforcement to obtain geo-location information, which may show the approximate location of a suspect at or near the time of the offense. (State's Ex. 4).

Deputy Parker also relayed her knowledge, again based on her training and experience, about the usage of these phones by suspects who have committed a murder. (State's Ex. 4). She stated that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." (State's Ex. 4). Likewise, she stated that these suspects often make

phone calls or send text messages just before and after the crime and use the Internet through their phones to search for information in a moment of panic or to cover up the offense. (State's Ex. 4).

The day after the phone was seized, the Honorable Brad Hart, judge of the 230th District Court of Harris County, Texas, found that Deputy Parker's affidavit was sufficient to establish probable cause for the issuance of a search warrant for the contents of the Samsung Galaxy5 phone. (State's Ex. 4). Judge Hart issued the warrant and ordered the forensic examination of the device. (State's Ex. 4).

Over two years later, the appellee moved to suppress (1) any evidence obtained from the traffic stop and the appellee's arrest, (2) all of his oral and written statements, and (3) any testimony about that evidence and those statements. (C.R. 66–73). The appellee alleged that law enforcement conducted a pretextual traffic stop and that the officers lacked probable cause to conduct the stop and to search the vehicle. (C.R. 67–70). The appellee also asserted that Deputy Parker included a false statement in her affidavit: "Baldwin gave consent to search the vehicle and a Samsung Galaxy5." (C.R. 70–71). In fact, the statement that Deputy Parker included in her affidavit was: "Baldwin gave consent to search the vehicle and a Samsung Galaxy 5, within a red and black case was recovered." (State's Ex. 4).

Following a hearing on the appellee's motion, the trial court—presided over by Judge Collins—made these findings:

- the traffic stop was "legitimate albeit pretexual;"
- the traffic stop was lawful;
- law enforcement did not seize the phone from the vehicle until the appellee consented to a search of the vehicle;
- because law enforcement lawfully detained the appellee and he consented to a search of the vehicle, law enforcement lawfully obtained the phone;
- Deputy Parker's testimony was credible that she asked for and did not receive consent to search the phone;
- even if Deputy Parker's statement about the appellee's consent to search the vehicle and the recovery of phone was a misstatement, it was not an intentional misstatement; and
- the affidavit was insufficient to create probable cause that the phone that the appellee had would contain evidence of a capital murder.

(I R.R. 194; II R.R. 4–18). Judge Collins orally granted the appellee's motion to suppress any evidence seized from the phone. (II R.R. 18). Judge Glass later signed a written order granting the appellee's motion to suppress in its entirety. (C.R. 96).

Summary of the Argument

Issue 1: The trial court erred in concluding that the affidavit was insufficient to establish probable cause to justify the issuance of the search warrant for the appellee's phone. The facts set out in the four corners

of the affidavit, combined with all reasonable inferences that the magistrate could have made, were sufficient to establish that there was a fair probability or substantial chance that evidence of the murder would be found within the phone. The magistrate could have reasonably inferred that the vehicle driven by the appellee just four days after the murder was connected to the offense and that the phone recovered from that vehicle would have evidence within it, such as communications between the suspects, identifying information, or geo-location data. Even if it were unreasonable to conclude that the phone was in or near the vehicle at the time of the offense, it was reasonable for the magistrate to infer that the phone belonged to the appellee and contained evidence of the identities of the previous possessors of the vehicle and, thus, evidence of the identities of the suspects who possessed the vehicle at the time of the offense.

Issue 2: Because the record shows that the officer who stopped the appellee had reasonable suspicion to detain him for a traffic violation and to arrest him for at least one traffic offense, the record supports the trial court's explicit findings that the traffic stop was "lawful" and "legitimate." Thus, the record shows that the appellee's statements did not result from an illegal detention or arrest. The trial court therefore erred in granting the appellee's motion to suppress his statements and testimony about those statements.

State's First Issue for Review

Because the affidavit contains sufficient probable cause to sustain the issuance of the search warrant for the contents of the appellee's phone, the trial court erred in concluding otherwise and in granting the appellee's motion to suppress evidence obtained from his phone on that basis.

I. Appellate and trial courts must give great deference to a magistrate's implicit finding of probable cause and, when in doubt, they must defer to all reasonable inferences that the magistrate could have made.

Normally, an appellate court reviews a trial court's ruling on a motion to suppress by using a bifurcated standard of review, where it gives almost total deference to the historical facts found by the trial court and reviews de novo the trial court's application of the law to those facts. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). But when the court is determining probable cause to support the issuance of a search warrant, there are no credibility determinations and the trial court is constrained to the four corners of the affidavit. *Id.*

Appellate review of an affidavit in support of a search warrant is not de novo. *State v. Dugas*, 296 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Rather, when reviewing a magistrate's decision to issue a warrant, appellate and trial courts must give great deference to a magistrate's implicit finding of probable cause. *McLain*, 337 S.W.3d at 271–72. Reviewing courts apply this highly deferential stand-

ard of review because of the constitutional preference for searches conducted under a warrant. *Id.* at 271. As long as the magistrate had a substantial basis for concluding that probable cause existed, a reviewing court must uphold the magistrate's probable-cause determination. *Id.* A reviewing court may not analyze the affidavit in a hyper-technical manner. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983)). Instead, it must interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. *Id.*

An officer must present an affidavit to a magistrate to obtain a search warrant for items constituting evidence of an offense. Tex. Code Crim. Proc. art. 18.01(b). The affidavit must set forth sufficient facts to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property or items to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) the property or items constituting such evidence are located at or on the particular person, place, or thing to be searched. Tex. Code Crim. Proc. arts. 18.01(c), 18.02(a)(10).

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272. This is a "flexible and non-demanding" standard. *Id.*; *accord Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007).

Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause. *Rodriguez*, 232 S.W.3d at 61. "Almost certainly, for example, fair probability does not require information that would persuade a reasonable person that the matter is more likely than not." *Id.* at 60 n.21 (quoting 40 George E. Dix & Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 5.03 (2d ed. 2001)).

Probable cause must be found within the four corners of the affidavit supporting the search warrant. *McLain*, 337 S.W.3d at 271. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez*, 232 S.W.3d at 61. That said, "the training, knowledge, and experience of law enforcement officials is taken into consideration." *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007). Reviewing courts thus allow officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them 'that might elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750–51 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981)).

"The inquiry for reviewing courts, including the trial court, is whether there are sufficient facts, coupled with inferences from those facts, to establish a 'fair probability' that evidence of a particular crime will likely be found at a given location." *Rodriguez*, 232 S.W.3d at 62.

"The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; [a reviewing court] focus[es] on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit." *Id.* (emphasis in original).

II. Because the trial court failed to give deference to the magistrate's determination of probable cause and failed to defer to all reasonable inferences that the magistrate could have made, it erred in concluding that the affidavit did not establish sufficient probable cause to sustain the issuance of the search warrant for the appellee's phone.

Under the totality of the circumstances, as set forth by the facts within the four corners of the affidavit coupled with all reasonable inferences that the magistrate could have made, there was a fair probability or substantial chance that the contents of the cell phone constitutes evidence of the capital murder and that this evidence would be found on the cell phone. The trial court erred in conducting a de novo review of the affidavit and in failing to defer to all reasonable inferences that the magistrate could have made. *See McLain*, 337 S.W.3d at 271–72.

The magistrate could reasonably infer that the vehicle driven by the appellee was linked to the capital murder. Law enforcement stopped the appellee in the vehicle bearing Texas license plate GTK-6426. A citizen identified the vehicle bearing this plate as a "white, 4-door Lexus vehicle," consistent with the registration for that license plate. (State's Ex. 4). This description matches the vehicle in which the suspects fled the scene of the offense. (State's Ex. 4). It also matches the description

of the vehicle that multiple citizens observed—and the video system captured—suspiciously circling the neighborhood the day before the murder and the day of the murder at the approximate time of the commission of the offense. (State's Ex. 4). Thus, it was reasonable for the magistrate to infer that the vehicle in which the appellee was stopped was connected to the offense.

The magistrate could also reasonably infer that law enforcement recovered the cell phone from the suspect vehicle. Deputy Parker did not explicitly state that law enforcement recovered the phone from the vehicle, but it was reasonable for the magistrate to make that inference because the phrase "Baldwin gave consent to search the vehicle" is immediately followed by the phrase "and a Samsung Galaxy5, within a red and black case was recovered." (State's Ex. 4).

It was also reasonable for the magistrate to infer that the phone found in the vehicle just four days after the murder contained evidence of the offense such as communications between the suspects, identifying information, and geo-location data. *See Robinson v. State*, 368 S.W.3d 588, 599 (Tex. App.—Austin 2012, pet. ref'd) (concluding that the magistrate could have reasonably believed that evidence related to a capital murder would be found in the defendant's vehicle given that it could have been used to flee the crime scene). In her affidavit, Deputy Parker recounted her knowledge, based on her training and experience, that a "smartphone" may contain identity evidence and that a search of the

phone will reveal the phone number and service provider for the device, which may be used to obtain information regarding the approximate location of the suspect at or near the time of the offense. (State's Ex. 4). Deputy Parker also stated, based on her training and experience, that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." (State's Ex. 4).

The affidavit establishes that at least two suspects committed the offense. (State's Ex. 4). Thus, the magistrate could have reasonably inferred that at least one of these suspects used the phone to plan and to execute the commission of the offense. *See King v. State*, No. 03-17-00276-CR, 2018 WL 5728765, at *7 (Tex. App.—Austin Nov. 8, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that the magistrate could have reasonably inferred that there was at least a fair probability that a cell phone would contain evidence of narcotics trafficking based on the large amount of drugs recovered along with the cell phone and the officer's stated experience that individuals arrested for possessing large amounts of controlled substances "typically" have cell phones "on or about their persons when they are arrested" and that these phones "typically" contain evidence of drug crimes).

Furthermore, even if it is unreasonable to infer that the phone was in or near the vehicle at the time of the offense, it was still reasonable for the magistrate to infer that the phone contained evidence of the

murder. Specifically, the magistrate could reasonably infer that the phone contained evidence of the identity of the suspects who possessed and operated the vehicle at the time of the offense. "Evidence of the identity of the perpetrator is evidence of a crime." *State v. McAlpin*, No. 03-06-00120-CR, 2007 WL 700839, at *3 (Tex. App.—Austin Mar. 7, 2007, no pet.) (mem. op., not designated for publication) (citing *Warden v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 1650 (1967); *Ackenback v. State*, 794 S.W.2d 567, 572 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd)).

Because the appellee possessed the phone and identified the number it carried, the magistrate could reasonably infer that it was his phone. The officers found the appellee operating the vehicle just four days after the offense. (State's Ex. 4). Thus, it was reasonable for the magistrate to infer:

(1) that the appellee possessed the vehicle at the time of the murder and was a party to its commission,

(2) that the appellee acquired the vehicle from the suspects who possessed the vehicle at the time of the offense, or

(3) that the appellee acquired the vehicle from another individual who obtained the vehicle from the suspects.

Likewise, the magistrate reasonably could have inferred from his common sense and the facts recounted in the affidavit that the appellee—if he did not possess the vehicle at the time of the offense—would

have used his phone to communicate with the person from whom he received the vehicle. *See McLain*, 337 S.W.3d at 271 (explaining that a magistrate should interpret an affidavit in a "commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences"); *see also Thomas v. State*, No. 14-16-00355-CR, 2017 WL 4679279, at *4 (Tex. App.—Houston [14th Dist.] Oct. 17, 2017, pet. ref'd) (mem. op., not designated for publication) (concluding that "there was no need for 'specialized knowledge'" for the magistrate to infer from common sense and the facts recounted in the affidavit that there was a fair probability or substantial chance that cell phones found in the apparent getaway car would contain evidence related to the robbery or who committed the robbery).

With the facts stated in the affidavit and proper deference to these reasonable, commonsense inferences, the trial court should have concluded that the affidavit was sufficient to establish probable cause. Instead of recognizing these inferences and giving great deference to the magistrate's finding of probable cause, the trial court took issue with the facts that were omitted from the affidavit. During the hearing, Deputy Parker testified that the appellee's stepfather told her, before the traffic stop, that he sold the vehicle to the appellee. (I R.R. 123–24). Deputy Parker did not include this information in the affidavit. (State's Ex. 4). The court expressed surprise that the affidavit omitted the fact that the

appellee owned the vehicle and that he "could arguably be described as a large black male." (I R.R. 184–88, 212).

The trial court also questioned the limited information in the affidavit connecting the appellee to the vehicle and to the commission of the offense. (II R.R. 17). In finding that the affidavit lacked probable cause, the trial court stated,

> [H]ere is the thing.
>
> The probable cause directed at that phone, there is nothing in that warrant directing probable cause to Mr. Baldwin at all because there is not even any connection of him in that warrant on the face of this warrant to that vehicle.
>
> So even if you were to argue that the vehicle and how they have outlined the vehicle and it being there at the scene, a similar one there at the scene, there is nothing in the warrant to tie that vehicle to Mr. Baldwin other than he was stopped four days later driving it; and I don't find that is sufficient to create the probable cause that the phone that he had would contain evidence of a capital murder.

(II R.R. 17–18).

A limited amount of information connected the appellee to the vehicle and to the commission of the offense: he operated the vehicle linked to the offense four days after its commission and, as a black male, he matched the general description of the suspects. (State's Ex. 4). Even so, it was unnecessary for the affidavit to connect the appellee to the commission of the offense. Rather, the affidavit had to connect the phone—specifically the items on the phone—to the offense. *See* Tex.

Code Crim. Proc. art. 18.01(c). Although Deputy Parker could have included additional information that established a stronger connection between the appellee, the vehicle, and the offense, "[t]he issue is not whether there are other facts that could have, or even should have, been included in the affidavit." *Rodriguez*, 232 S.W.3d at 62. Rather, a reviewing court should "focus on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit." *Id.* (emphasis in original).

Ultimately, the affidavit must establish a nexus—directly or through reasonable inference—between the criminal activity, the things to be seized, and the place to be searched. *See Bonds v. State*, 403 S.W.3d 867, 873–74 (Tex. Crim. App. 2013). This Court recently stated that "an affidavit offered in support of a warrant to search the contents of a cellphone must *usually* include facts that a cellphone was used during the crime or shortly before or after." *Foreman v. State*, 561 S.W.3d 218, 237 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (en banc) (emphasis added). The Court also stated, "*Generally*, to support a search warrant for a computer, we have held there must be some evidence that a computer was directly involved in the crime." *Id.* (emphasis added). Of course, if these facts and evidence are usually or generally required, they are not always required.

Accordingly, this Court has upheld magistrates' findings of probable cause in the absence of evidence that the computers or cell phones

to be search were directly involved in the offense. *See, e.g.*, *Thomas*, No. 14-16-00355-CR, 2017 WL 4679279, at *4 (upholding a magistrate's finding of probable cause to search a cell phone found in a vehicle directly tied to an armed robbery but "left unlocked for a prolonged period of time" for evidence pertaining to the robbery and who committed the robbery); *Checo v. State*, 402 S.W.3d 440, 449–50 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (upholding a magistrate's finding of probable cause to search a computer for and seize child pornography when the affidavit included facts that established that the defendant attempted to sexually assault a child, had a laptop computer set up to take photos and video, and showed her adult pornography on another computer and the officer recounted his expertise which linked the defendant's actions and the likelihood that he possessed child pornography).

As discussed above, a reasonable reading of the affidavit—with deference to the magistrate's implicit finding of probable cause and to all reasonable inferences that the magistrate could have made—establishes that there was a fair probability that the phone contained evidence of the murder. *See Rodriguez*, 232 S.W.3d at 59–62; *McLain*, 337 S.W.3d at 271–72; *Davis v. State*, 202 S.W.3d 149, 157–58 (Tex. Crim. App. 2006) (concluding that, despite the fact that the affidavit "was far from exemplary" and that it was within the magistrate's discretion to deny the search warrant, the law required the Court to defer to the magis-

trate's reasonable, common sense conclusions and to find that the magistrate had drawn reasonable available inferences in finding that the affidavit supplied probable cause).

From the face of the affidavit, the magistrate had a substantial basis to find, through reasonable inferences, a nexus between the capital murder, the phone, and its contents. *See Bonds*, 403 S.W.3d at 873–74. If the phone was in or near the vehicle at the time of the murder, as suggested by its presence in the vehicle just four days after the murder, there is a fair probability that the phone would contain evidence of the offense, such as communications with accomplices, identifying information, and geo-location data. Even if it is unreasonable to infer that the phone was in the vehicle at or near the time of the offense, there is a fair probability that the phone of the appellee, the person possessing and operating the vehicle only four days later, would contain evidence of the identity of the suspects who committed the murder. Thus, the affidavit was sufficient to establish probable cause to justify the issuance of the search warrant for the appellee's phone, and the trial court erred in concluding otherwise. This Court should therefore overrule the trial court's order granting the appellee's motion to suppress the evidence obtained from his cell phone and any testimony about that evidence.

State's Second Issue for Review

The trial court erred in granting the appellee's motion to suppress his statements and any testimony about those statements because

the record and the court's findings contradict the conclusion that law enforcement obtained this evidence illegally.

I. An officer may stop a vehicle for a traffic violation so long as the stop is objectively reasonable and there is reasonable suspicion to believe that the driver has committed a traffic violation.

A traffic stop is reasonable when there is either probable cause to believe that a traffic violation has occurred or reasonable suspicion that someone in the vehicle is committing or has committed a criminal offense. *Overshown v. State*, 329 S.W.3d 201, 205 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772 (1996); *Arizona v. Johnson*, 555 U.S. 323, 326, 129 S. Ct. 781, 784 (2009)). As with any investigative stop, proof of the actual commission of the offense is not a requisite for a peace officer to stop a motorist to investigate a traffic violation. *Leming v. State*, 493 S.W.3d 552, 561 (2016) (citing *Drago v. State*, 553 S.W.2d 375, 377 (Tex. Crim. App. 1977)).

A reviewing court evaluates the reasonableness of a traffic stop on an objective standard, and an officer's subjective intent plays no role in determining whether the stop was reasonable. *Overshown*, 329 S.W.3d at 205. Thus, an officer may validly stop a vehicle for a traffic violation so long as the stop is objectively reasonable, even if the stop is a mere pretext to investigate unrelated criminal conduct. *Id.*; *see Crittenden v.*

State, 899 S.W.2d 668, 674 (Tex. Crim. App. 1995) (holding that an objectively valid traffic stop is not unlawful "just because the detaining officer had some ulterior motive for making it").

II. The trial court erred in suppressing the appellee's statements and testimony about those statements because the record, including the trial court's findings, shows that law enforcement lawfully obtained those statements.

In his motion to suppress, the appellee complained that his "statements should be suppressed because they are the result of an illegal arrest and are the fruit of an illegal stop." (C.R. 71). The record establishes that the officer who stopped the appellee's vehicle had reasonable suspicion to believe that the appellee had committed a traffic violation, that the officer has probable cause to arrest the appellee, and that law enforcement lawfully obtained his statements.

Deputy Parker testified that she requested a marked patrol unit to develop probable cause for a traffic violation and to conduct a traffic stop of the appellee's vehicle. (I R.R. 126). Deputy Johnson followed the appellee and observed him commit the traffic violation of unsafe lane change. (I R.R. 10); *see* Tex. Transp. Code § 545.060(a) ("An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely."). Deputy Johnson observed the appellee's vehicle move across two lanes in a single movement during medium traffic, cross into the

safety or "gore" zone, and exit the freeway.[3] (I R.R. 10–13, 44; State's Ex. 1). Deputy Johnson described the safety or "gore" zone as "the triangulated portion of the exit that nobody is supposed to drive through." (I R.R. 10).

Deputy Johnson asked the appellee for his driver's license, but the appellee failed to provide one and instead presented an identification card. (I R.R. 15). Upon running the appellee's identification card, Deputy Johnson learned that the appellee's driver's license was expired. (I R.R. 15–16). Deputy Johnson placed the appellee under arrest for three traffic violations: unsafe lane change, no driver's license upon demand, and operating a motor vehicle with an expired driver's license. (I R.R. 16–17); *see* Tex. Transp. Code § 521.025(a) ("A person required to hold a license under Section 521.021 shall: (1) have in the person's possession while operating a motor vehicle the class of driver's license appropriate for the type of vehicle operated; and (2) display the license on the demand of a magistrate, court officer, or peace officer."). After

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[3] An appellate court may review *de novo* "indisputable visual evidence" contained in a video recording. *State v. Duran*, 396 S.W.3d 563, 570 (Tex. Crim. App. 2013) (citing *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000)). The dash camera video from Deputy Johnson's patrol vehicle does not clearly depict whether or how much of the appellee's vehicle crossed into the safety or "gore" zone. (State's Ex. 1). Because the visual evidence is not indisputable, this Court must defer to the trial court's implicit finding that, "from the officer's perspective," the appellee crossed over that zone. (I R.R. 192); *see State v. Gobert*, 275 S.W.3d 888, 892 n.13 (Tex. Crim. App. 2009) (concluding that it is appropriate for an appellate court to defer to the trial court's primary fact-finding function even for recorded evidence when the recording does not indisputably refute the trial court's finding).

Deputy Johnson arrested the appellee, another deputy transported him to an interview room at the HCSO Homicide Division. (I R.R. 20, 128). Deputy Parker and another investigator *Mirandized* the appellee and recorded his interview. (I R.R. 129).

After hearing Deputy Johnson's testimony and reviewing the dash camera video from his patrol vehicle, Judge Collins concluded that it was reasonable for Deputy Johnson to believe that the appellee changed lanes in an unsafe manner and that he "had a reason to pull [the appellee] over . . . ." (I R.R. 192–93). Judge Collins explicitly found that the traffic "stop was legitimate albeit pretexual." (I R.R. 194). She also found "that the stop was lawful." (II R.R. 4). Although Judge Collins announced that she was granting the appellee's motion to suppress the evidence seized from the phone, she did not grant the remainder of the appellee's motion to suppress. (II R.R. 18). The trial court thus implicitly denied the appellee's motion to suppress his statements and testimony about those statements. Yet, the trial court—presided over by Judge Greg Glass—later signed a written order granting the appellee's "Motion to Suppress Illegally Seized Evidence" in its entirety.[4] (C.R. 96).

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[4] Given the disparity between the trial court's findings and implicit oral ruling at the conclusion of the hearing and the trial court's written order, it is possible that the trial court did not intend to grant the appellee's motion to suppress his statements and testimony about those statements. This Court may abate this appeal for the

The trial court's findings on the legality of the stop are supported by the record and the law. Although the record shows that the traffic stop was pretextual, it was objectively reasonable and valid. *See Overshown*, 329 S.W.3d at 205; *Crittenden*, 899 S.W.2d at 674. The record also shows that the appellee was stopped and detained upon a reasonable suspicion that he had committed a traffic violation. An officer may detain a person when he commits a traffic violation in an officer's presence. *Aviles v. State*, 23 S.W.3d 74, 77 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Making a multiple lane change in a single maneuver is not a per se violation of any law. *Id.* However, a person commits a traffic violation when he changes marked lanes when it is unsafe to do so. *Leming*, 493 S.W.3d at 559; Tex. Transp. Code § 545.060(a). A peace officer may make a warrantless arrest of any person who commits a traffic violation. Tex. Transp. Code § 543.001; *see* Tex. Code Crim. Proc. art. 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.").

Although a multiple-lane change is not inherently unsafe, Deputy Johnson was reasonable in believing that the appellee's multiple-lane

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trial court to clarify whether it intended to grant the appellee's motion to suppress in its entirety or merely the evidence obtained from his cell phone. Tex. R. App. P. 43.6. ("The court of appeals may make any other appropriate order that the law and the nature of the case require."); *see Henery v. State*, 364 S.W.3d 915, 918–19 (Tex. Crim. App. 2012) (holding that the court of appeals was required to abate the case to the trial court where the trial court's oral denial of the defendant's motion to quash conflicted with the trial court's written order granting the motion).

change was unsafe. *See Aviles*, 23 S.W.3d at 78. As the appellee's vehicle approached the exit in medium traffic, he maneuvered his vehicle between and close to two vehicles traveling in the right lane. (State's Ex. 1). He then immediately exited the freeway, crossing into the safety or "gore" zone. (State's Ex. 1; I R.R. 10, 44). The appellee exited the freeway at the same time as and in close proximity to the vehicle behind him. (State's Ex. 1). Given the traffic conditions, the proximity of the other vehicles, and the appellee's act of driving across multiple lanes, through the "gore" zone, and into the exit lane at the same time as another vehicle, Deputy Johnson had reasonable suspicion to believe that the appellee committed an unsafe lane change. *Cf. Aviles*, 23 S.W.3d at 78 (concluding that when the defendant signaled his intent to change lanes and deliberately moved across two lanes of traffic to avoid a collision with a vehicle on the shoulder, he did not accomplish his multiple-lane change in an unsafe manner, but noting that the result might have been different with evidence that traffic was congested and that there was no room to safely execute a multiple lane change or evidence that the lane change could not be made safely for some other reason).

By observing the appellee drive through the safety or "gore" zone, Deputy Johnson also had reasonable suspicion to believe that the appellee disregarded a traffic control device. *See* Tex. Transp. Code § 544.004(a) ("The operator of a vehicle or streetcar shall comply with an applicable official traffic-control device placed as provided by this

subtitle unless the person is: (1) otherwise directed by a traffic or police officer; or (2) operating an authorized emergency vehicle and is subject to exceptions under this subtitle."). Deputy Johnson did not cite this offense as a basis for the traffic stop, but an officer's stated reason for conducting a stop is not controlling if there is an objectively reasonable basis for the stop. *See State v. Bernard*, 545 S.W.3d 700, 704 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("An officer's stated purpose for a stop can neither validate an illegal stop nor invalidate a legal stop because the stop's legality rests on the totality of the circumstances viewed objectively.").

Thus, Deputy Johnson had reasonable suspicion to believe that the appellee committed two traffic violations before he initiated the traffic stop. The record therefore supports the trial court's finding that the stop was lawful. Furthermore, because Deputy Johnson could arrest the appellee for any of his traffic violations, the appellee's arrest was also lawful. *See* Tex. Transp. Code § 543.001; Tex. Code Crim. Proc. art. 14.01(b). Because the record, including the explicit findings of the trial court, shows that law enforcement lawfully obtained the appellee's statements, this Court should overrule the trial court's order granting the appellee's motion to suppress evidence of the appellee's statements and testimony about those statements.

Conclusion

The trial court erred in granting the appellee's motion to suppress evidence obtained from his cellular telephone, his statements, and testimony about that evidence. The State therefore requests that this Court reverse the trial court's order granting the appellee's motion to suppress.

Respectfully submitted,

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